NO. 21883

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLYNN MILLER JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF JURISDICTION

On February 2, 1967, the United States Attorney for the Central District of California, filed a one-count misdemeanor information against Glynn Miller Johnson for the unauthorized sale of property in violation of Title 18, United States Code, §641 [C. T. 3]. 1/ Following a trial by jury before the Honorable John W. Delehant, Senior United States District Judge, 2/ from

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1/ "C. T." refers to the Clerk's Transcript.

2/ Sitting by designation of Chief Justice Earl Warren.

February 2 to February 3, 1967, appellant was found guilty [C. T. 2].

Appellant was convicted and sentenced on March 6, 1967, to the custody of the Attorney General for six months [C. T. 7]. On March 6, 1967, a timely notice of appeal was filed [C. T. 9].

On March 27, 1968, the appeal was dismissed for lack of prosecution.

On August 16, 1968, this Court reinstated the appeal.

The District Court had jurisdiction under the provisions of Title 18, United States Code, §§641 and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, §§1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, §641, provides, in pertinent part:

> "Whoever . . . without authority, sells, conveys or disposes of . . . any thing of value of the United States or of any department or agency thereof; . . .
>
> "Shall be fined not more than $10,000, or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than

$1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

III

QUESTION PRESENTED

Whether the following evidence should have been admitted as proof of a prior similar act to show intent:

A. Testimony, without objection, relative to a sale, made by appellant, three days before the date of the offense alleged in the information, of a stolen cashier's check without authority, and

B. A stolen cashier's check sold by appellant three days before the date of the offense alleged in the information.

IV

STATEMENT OF FACTS

On September 24, 1966, Glynn M. Johnson sold a stolen cashier's check to Leslie Finder with funds provided by Stephen Kessler for $13.50 [Ex. 3, R.T. 83, 60-61, 106].[3/] At that time Johnson said he had quite a few postal money orders ranging

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3/ "R.T." refers to the Reporter's Transcript.

from 60 to 80 dollars each, totaling approximately $800 which he could sell for around $500 [R.T. 51, 85]. At, or about the same time Johnson said he had connections for different types of money orders and he showed Finder and Kessler a postal money order [R.T. 84].

On September 27, 1966, while being followed by postal inspectors, Finder and Kessler met with Johnson and proceeded to Johnson's house with Johnson [R.T. 54-56]. Following some negotiation, Finder handed Johnson $50 in return for Exhibit 1, a postal money order [R.T. 56-58]. The money consisted of two twenties and a ten [R.T. 58]. Before Johnson handed Finder Exhibit 1 he wiped it clean and placed it into an envelope, Exhibit 2 [R.T. 58].

Exhibit 1, the postal money order referred to in the information, was stolen from the Post Office at Picacho, Arizona [R.T. 43], and the Postmistress did not authorize anyone to sell it.

Exhibit 3, the cashier's check, was stolen between July 31, 1966, and August 1, 1966, from a grocery store owned by Harry W. Wong [R.T. 106].

At the time of Johnson's arrest he had in his hand one of the twenties given Kessler by a postal inspector (Exs. 4, 5; R.T. 112, 115].

V

ARGUMENT

THE EVIDENCE RELATING TO THE SALE OF ANOTHER STOLEN NEGOTIABLE INSTRUMENT WAS PROPERLY ADMITTED TO SHOW THE APPELLANT'S INTENT.

Evidence of other crimes is admissible to prove intent and to prove the absence of mistake or accident. Fineberg v. United States, 393 F. 2d 417 (9th Cir. 1968); Carlino v. United States, 390 F. 2d 624 (9th Cir. 1968); Loux v. United States, 389 F. 2d 911 (9th Cir. 1968); Theobald v. United States, 371 F. 2d 769 (9th Cir. 1967); Reed v. United States, 364 F. 2d 630 (9th Cir. 1966), cert. denied 386 U.S. 918.

At the trial, appellant objected to the introduction of Exhibit 3, a stolen cashier's check, sold by him on September 24, 1966, on the grounds that it was irrelevant and immaterial and at R.T. 108, on the ground that it was prejudicial because he had not had time to prepare a defense.

The appellee can find no objection made to the testimony relative to Exhibit 3. Finder and Kessler testified relative thereto, without objection, and the defense cross-examined each.

The fact is that the testimony relative to Exhibit 3, and the exhibit itself, proved that Johnson's act of selling Exhibit 1 was not a mistake. On two proven occasions Johnson sold the property of another without authority. Appellant here urges that

both sales were not of property of the United States. No authority is given or cited for the proposition that such a consideration is relevant.

Appellant appears to urge that in the absence of an admission of the act, evidence relevant to intent is inadmissible. Such is not the law. Henderson v. United States, 143 F. 2d 681 (9th Cir. 1944).

Appellant objects to a statement in the argument of the prosecutor relative to there being evidence of Johnson being in the business of selling "hot money orders or stolen money orders." Appellant points out that the testimony relative to Exhibit 3 was to prove intent. However, there was evidence that Johnson had other postal money orders for sale with a face value of approximately over $800 [R. T. 51, 85].

Appellant alludes briefly to a dissatisfaction with the Court's instructions. It appears that such objection, if any, is too late, especially in light of appellant's counsel's statement after the charge that he had no exceptions thereto [R. T. 213].

VI

CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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